IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

FRIDAY, THE 2ND NOVEMBER 2007 / 11TH KARTHIKA 1929

CMA.No. 238 of 2002()

AS.193/1996 of SUB COURT,NEYYATTINKARA
OS.477/1982 of II ADDL.M.C.,NEYYATTINKARA
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APPELLANTS: APPELLANTS & RESPONDENTS 5 TO 12/ LEGAL HEIRS OF DEFENDANT 1 AND DEFENDANTS 3 TO 7:
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1. M.J.SARASWATHY AMMA, AGED 60,
LEKSHMI NIVAS, VAZHUTHOOR DESOM,
NEYYATTINKARA TALUK.

2. JAYALEKSHMI, D/O. M.J.SARASWATHY AMMA,
AGED 34 OF -DO- -DO-.

3. S.SATHEESH KUMAR,
AGED 32 OF -DO- -DO-.

4. KAMALAMMA, W/O. VELAYUDHAN PILLAI,
AGED 76, MANGALAMANDIRAM, VAZHUTHOOR DESOM,
NEYYATTINKARA VILLAGE.

5. HARI NARAYANAN,
S/O. VELAYUDHAN PILLAI, AGED 45 OF -DO- -DO-.

6. SREEKUMARAN NAIR,
S/O. VELAYUDHAN PILLAI, AGED 43 OF -DO- -DO-.

7. PRATHAPACHANDRAN,
S/O. VELAYUDHAN PILLAI, AGED 41 OF -DO- -DO-.

8. MANGALAMBIKA,
D/O. KAMALAMMA, AGED 36 OF -DO- -DO-.

9. VISEWAN, S/O. VELAYUDHAN PILLAI,
AGED 32 OF -DO- -DO-.

10. MAHALEKSHMI, D/O. M.J.SARSWATHY AMMA,
AGED 35, LEKSHMI NIVAS, VAZHUTHOOR DESOM,
NEYYATTINKARA TALUK.

11. VISWALEKSHMI, D/O. M.J.SARASWATHY AMMA,

AGED 28 OF -DO- -DO-.

BY ADV. SRI.R.T.PRADEEP
SRI.V.VIJULAL
SRI.T.A.PRASANTH

RESPONDENTS: RESPONDENTS 1 TO 4/
DEFENDANT 2 & LEGAL HEIRS OF PLAINTIFFS
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1. KARTHIAYANI PILLAI AMBIKA KUMARY,
MEDAYIL VEEDU, KADAVATTARAM DESOM,
NEYYATTINKARA VILLAGE.

2. RAJAMMA, W/O. RAMAN PILLAI,
AGED 70, RAMARAJAN BHAVAN, VAZHUTHOOR DESOM,
NEYYATTINKARA VILLAGE.

3. JAYAKUMARI, D/O. RAJAMMA,
AGED 38 OF -DO- -DO-.

4. MADHU, S/O. RAMAN PILLAI,
AGED 35, -DO- -DO-.

BY ADV. SRI.G.S.REGHUNATH
SRI.NAGARAJ NARAYANAN

THIS CIVIL MISC. APPEAL HAVING BEEN FINALLY HEARD ON 02/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

"C.R"

K. PADMANABHAN NAIR ,J.

C.M.A.No.238 of 2002

Dated, this the 2nd day of November, 2007

JUDGMENT

Defendants 3 to 7 and legal heirs of defendant No.1 in O.S.No.477/1982 on the file of the II Additional Munsiff, Neyyattinkara are the appellants in this appeal. Appeal is filed against an order of remand passed by the lower appellate court by which it remanded the case for a limited purpose of considering the owelty amount due to other sharers after confirming allotment of various plots to the parties. The properties originally belonged to Seethalakshmi Amma who died as a spinster. Plaintiff and defendants were her heirs. Defendants 1 and 3 to 7 filed a joint written statement admitting most of the plaint claims. They raised a contention that item No.1 being a most valuable property may be allotted to their share. 2nd defendant filed a written statement contending that she is residing in the building situated in item No.1. It was contended that deceased had obtained a loan mortgaging item No.2. It was also contended that deceased was residing with her and the plaintiff and 1st defendant had obtained gold ornaments weighting 10 sovereigns and the value of that is to be reduced from the shares allotted to them. 2nd defendant also raised a contention that item No.1 is not partiable. It was also contended that since she is residing in item No.1 the same may be allotted to her. The only document produced is Ext.A1 partition deed dated 23.9.1959 in which the suit properties were allotted to the deceased Seethalakshmi Amma. There is no

dispute regarding quantum of share. Plaintiff is entitled to get 1/4, 1st defendant is entitled to 1/4, defendants 3 to 7 together are entitled to get 1/4 and the 2nd defendant is entitled to get 1/4. Defendants1 and 3 to 7 prayed for a joint allotment. When the matter came up for trial the 2nd defendant did not press her contention that item No.1 is not partiable. So the trial court held that item No.1 was also partiable. The equities and reservations claimed were left open to be decided at the time of passing of the final decree. The trial court observed as follows:

> "With regard to the allotment of the building and the properties therein equitable distribution will be considered at the time of the passing of the final decree. Thus equities and reservations are relegated to the stage of final decree".

A final decree application was filed by defendants 3 to 7. A commissioner was deputed who filed Ext.C1 report and C1 to C9 plans. In plan No.1 Commissioner divided item No.1 in A schedule into three plots. Plaintiff was given a plot having an extent of 450 sq. links. Defendants 1 and 3 to 7 were allotted a plot having an extent of 750 sq. links and 2nd defendant was allotted a plot having an extent of 450 sq. links. In that plan IJKL plot having an extent of 4 cents was allotted to the 2nd defendant. In plan No.6 the commissioner allotted item No.1 in A schedule exclusively to 2nd defendant. In plan No.8 the commissioner allotted item No.1 in A schedule in exclusively to defendants 1 and 3 to 7. In plan Nos. 6 and 8 also the commissioner allotted 4 cents of land

comprised in re-survey No.327/3 to the 2nd defendant. Plaintiff and 2nd defendant alone filed objections to the report of the commissioner. Plaintiff contended that item No.1 in A schedule should be allotted to him exclusively. Defendants 1 and 3 to 7 contended that the plan No.8 by which item No.1 in A schedule allotted to them exclusively shall be accepted. Commissioner was examined. After enquiry trial court accepted plan No.6 by which item No.1 was exclusively allotted to the 2nd defendant and directed her to pay owelty to the plaintiff and other defendants. Challenging that decree and judgment defendants 3, 5 and 6 filed A.S.No.193/1996 before the Sub Court, Neyyattinkara. The learned Sub Judge confirmed the finding regarding allotment of plots but held that owelty amount fixed is very low and that is to be refixed. For that purpose alone the learned Sub Judge remanded the matter to the trial court after confirming all other findings of the trial court. Challenging that remand order legal heirs of defendant No.1 and defendants 3 to 7 have filed this appeal.

2. At the time of filing of the appeal no substantial questions of law were framed. Subsequently the appellants filed I.A.No.3320/2007 seeking permission to raise questions of law. The following questions of law are raised:

I. When the plea of non-partiability of the building in the first property in plaint schedule item No.(1) racked up by 2nd defendant being repelled in the preliminary decree of partition, whether the said defendant is legally estopped from seeking exclusive allotment of the building in the

final decree proceeding.

II. Whether the allotment of building exclusive to 2nd defendant in the final decree despite she being allotted with another building by virtue of Exhibit A1 partition deed would result in manifest injustice.

III. Whether the allotment of second property to an extent of 4 cents in plaint schedule item No.(1) to 2nd defendant when she doesn't have any claim for the same had resulted in manifest injustice.

IV. Whether the non-consideration of the second property in plaint schedule item No.(1) of either of the courts below resulted in material illegality and irregularity.

3. When the appeal is taken up for hearing Advocate Shri G.S.Reghunath, learned counsel appearing for the contesting respondents raised a preliminary objection that the substantial questions of law raised in this case cannot be considered. It is argued that in an appeal against remand under Order XLIII Rule 1(u) of CPC this Court can consider the correctness of the point remanded for reconsideration. It is argued that in this case remand was for refixing the owelty amount alone and in this appeal this Court can consider only whether the finding of the lower appellate court that owelty amount fixed was correct or not. In other words the scope is limited to the consideration of correctness or otherwise which was remanded for consideration and not any other matter which are concluded on its merits by the lower appellate court. The

learned counsel relied on the decision reported in **Narayanan v. Kumaran (2004 (2) KLT 312 (SC))** in which it was held that the appeal under Order XLIII Rule 1, Clause (u) should be heard only on the ground enumerated in Section 100 of CPC. In the above cited case the Apex Court held as follows:

> "It is obvious from the above rule that an appeal will lie from an order of remand only in those cases in which an appeal would lie against the decree if the Appellate Court instead of making an order of remand had passed a decree on the strength of the adjudication on which the order of remand was passed. The test is whether in the circumstances an appeal would lie if the order of remand where it is to be treated as a decree and not a mere order. In these circumstances, it is quite safe to adopt that appeal under O.43 R.(1) clause (u) should be heard only on the ground enumerated in S.100. We, therefore, accept the contention of Mr.T.L.V.Iyer and hold that the appellant under an appeal under O.43 R.(1) clause (u) is not entitled to agitate questions of facts. We, therefore, hold that in an appeal against an order of remand under this clause, the High Court can and should confine itself to such facts, conclusions and decisions which have a bearing on the order of remand and cannot canvass all the findings of facts arrived at by the Lower Appellate Court."

4. I find it extremely difficult to agree with the argument advanced by the learned counsel appearing for the contesting respondents. Had the appellate court dismissed the appeal in toto the aggrieved party could have maintained a Second Appeal. Of course that can only be in accordance with the provisions contained in Section 100 of Civil Procedure Code. The appellant in that Second Appeal is not entitled to agitate questions of fact. It is to be noted that if the order

of remand is in the nature of an interlocutory order the parties are not aggrieved. But if the appellate court decides any point and remand the case for reconsideration of other point the aggrieved party must challenge those findings by filing a Miscellaneous Appeal before this Court. If he fails to challenge the point decided by the appellate court on its merits he will be precluded from challenging the correctness of that finding at a subsequent stage. So the aggrieved party is entitled to challenge all concluded findings of the lower appellate court in a remand order. But that challenge can only be in accordance with the provisions contained in Section 100 of Civil Procedure Code. The party cannot challenge a finding of fact on the ground that the appeal is against an order of remand. So an aggrieved party can challenge concluded findings in an order of remand provided substantial questions of law arises. Apex Court only held that in such an appeal the appellant is not entitled to agitate questions of facts. If the contention of the respondents is accepted the aggrieved party will be left without any remedy. He will not be in a position to challenge the points decided by the lower appellate court by filing a C.M.A. He will not be in a position to challenge the correctness of that finding in a regular appeal to be filed against the decree passed after remand as the same is barred by res judicata. So I overrule the objection raised by the respondents and hold that in this C.M.A. the appellants are entitled to challenge the correctness of the findings of the lower appellate court. But that challenge can be only on any of the grounds enumerated in Section 100 of C.P.C..

5. Learned counsel appearing for the appellants has argued that item No.1 in A schedule and the property having an extent of 4 cents are the most valuable properties and both the properties were allotted to the 2nd defendant. It is argued that the allotment is highly inequitable and irreparable injury is caused to the plaintiffs and other defendants by payment of owelty amount alone and the same cannot be compensated. It is also argued that Ext.A1 document produced in the suit will show that 2nd defendant was allotted the main family house at the time of partition and she is residing in that house. It is further argued that the father of the 3rd appellant was conducting a studio in that building in the disputed item and while the 3rd appellant was young his father died and at that point of time 2nd defendant who was residing in the rear side of that building trespassed into the building and reduced the same also into her possession after forcibly evicting the 3rd appellant. It is argued that there is absolutely no equity in her favour. It is also argued that the final decree passed is inconsistent with the preliminary decree. It is further argued that the 2nd defendant raised a contention that item No.1 is not partiable but in the preliminary decree stage that contention was overruled and it was held that it was also partiable and as such allotting the whole item to her virtually gives the same relief which was expressly denied in the preliminary decree to her. It is true that Ext.A1 partition deed in the year 1959 refers to a building in the property allotted to the 2nd defendant.

6. When the commissioner went to the plot for effecting the partition

she was told that the 2nd defendant is having that building also. But the commissioner had reported that the 2nd defendant is residing in the building situated in item No.1. Thereafter she prepared three plans. In the first plan item No.1 was allotted to the 2nd defendant; in the second plan it was allotted to defendants 1 and 3 to 7 and in the third plan that plot was divided into three plots. While dividing the plot into three commissioner divided the building also into three parts. As I have already stated the plaintiff and 2nd defendant alone filed objection to the report. Neither the 1st defendant nor defendants 3 to 7 filed any objection to the report. Commissioner was examined as DW1 by the 2nd defendant. Commissioner was cross-examined by the plaintiff alone. Appellants never raised a contention that it is inequitable to allot entire item No.1 and four cents comprised in re-survey No.327/3 and also item in re-survey No.337/10A to one person. They do not have a case that the 2nd defendant is residing in another building. On the other hand they had admitted that the 2nd defendant is in possession of the building though they would allege that the 2nd defendant trespassed into the building after the death of the father of the 3rd appellant. They also not raised a contention that in case item No.1 in A schedule is exclusively allotted to the 2nd defendant they should be allotted the four cents comprised in re-survey No.327/3. A reading of the judgments of the trial court and lower appellate court shows that dispute was regarding only in respect of item No.1 in A schedule. As I have already stated in respect of that plot there were three plans available.

The parties were aware of the fact that it is impossible to accept all the three plans. Court can accept only one of the three plans. Appellants never raised who should be alloted the four cents of property in case of allotment of A1 property to the 2nd defendant. They did not adduce any evidence also. In fact the question arose for consideration for the court was whether item No.1 in A schedule should be given to the appellants or 2nd defendant. Both the courts concurrently found that since 2nd defendant is residing in the building situated in that property that is to be allotted to her. So in the particular case none of the questions of law framed arise for consideration. So there is no merit in the Civil Miscellaneous Appeal and the same is only to be dismissed.

7. Learned counsel appearing for the appellants submitted that while fixing the owelty amount the lower appellate court found that the value of the property allotted to the 2nd defendant is too low. It is argued that direction may be issued to the commissioner to fix the market value as on this date. Lower appellate court held that 2nd defendant will get absolute title over ABCD plot only on deposit of the owelty amount to be determined by the trial court. The lower appellate court directed re-determination of the owelty amount due to defendants 3, 5 and 6 alone. Those are all matters to be considered by the trial court. The parties are bound by the terms of the remand order.

In the result, Civil Miscellaneous Appeal is dismissed. Parties are directed

to suffer their respective costs.

C.M.P.Nos.7106/2002 & 2498/2003 will stand dismissed.

K. PADMANABHAN NAIR,
JUDGE.

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K.PADMANABHAN NAIR, J.

C.M.A.No.238 of 2002

JUDGMENT

2nd November, 2007.